

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant]

Record of Proceedings

Grievant

Case No. 2000-14

And

Date: April 2, 2002

USAID

DECISION

(Excised 4/02)

For the Foreign Service Grievance Board:

Presiding Member:

Charles D. Ablard

Board Members:

James E. Blanford
David Lazar

Senior Advisor

Donna Anderson

Representative for the Grievant:

Self

Representative for the Agency:

David Kotz
Chief, Labor Relations Staff

Employee Exclusive Representative:

American Foreign Service
Association

OVERVIEW

Grievant claimed that omissions and falsely prejudicial statements in his 1997 and 1998 AEFs caused the 1998 Performance Standards Board (PSB) to direct his separation. Grievant did not adequately support his claim that certain comments were falsely prejudicial, either in his submissions or through testimony at his hearing. The Board noted that grievant had a significant role in writing his Annual Evaluation Forms (AEF) and could have added comments about skills and achievements in his employee statements. (FSGB Case Nos. 97-72 and 97-57) Overall the AEFs met “reasonable standards.” (FSGB Case No. 93-15)

Grievant also argued that the agency failed to place him in assignments that would have made him competitive, citing FSGB Case Nos. 92-078, 94-18, 95-18, and 96-007. The Board noted that grievant had selected his most recent assignment against the advice of his career counselor, and that neither his most recent assignment nor the previous one (which he evidently chose as well) were shown to be below-grade or nontraditional. Thus the Board found no parallel with the cases cited by grievant. The Board found precedent in FSGB Case No. 98-72, “employees whose overall performance is very strong can be found less competitive than their peers whose records reflect enhanced breadth of experience and responsibilities.”

Grievant maintained that the PSB directed his separation on the basis of “area for improvement” comments that resulted from mental health problems. The Board denied the claim, noting that it was not supported by either medical evidence or testimony, and that grievant did not request any accommodation under the Rehabilitation Act of 1973.

DECISION

I. THE GRIEVANCE

On April 30, 1999, (grievant), an FS-02 Officer with the Agency for International Development (USAID) filed a grievance with that agency alleging that the 1998 Program Direction and Development Board (PDDB) and the 1998 Performance Standards Board (PSB) misinterpreted his Annual Evaluation Forms (AEFs) for 1996-1997 and 1997-1998; that his 1990 and 1991 AEFs contained false and prejudicial statements; and that the agency violated Handbook 25 by not providing [grievant] with a work plan from 9/22/93 to 3/31/94. As remedy, [grievant] requested: (1) prescriptive [interim] relief; (2) expungement of his 1995, 1996, and 1998 D rankings; (3) removal and destruction of 1995, 1996, and 1998 PSB statements and all related material; (4) immunity from low ranking and separation for at least two years; (5) other relief deemed just and proper.

The agency denied [grievant]'s grievance on February 18, 2000, and he appealed to this Board on March 10, 2000. In his appeal, [grievant] stated he was grieving the 1998 PSB's decision to designate him for separation, 1996 and 1998 low rankings by the Selection Boards, and, in particular, the AEFs he received for 1996-1997 and 1997-1998 because of their falsely prejudicial nature. [Grievant] sought relief comparable to that sought at agency level.

II. BACKGROUND

[Grievant] served as a project development officer in the Bureau for Africa, AFR/SA/PAD, from 1993 to 1996. In 1996, he began an assignment as a senior business specialist in the Office of Small and Disadvantaged Business Utilization (OSDBU).

On August 4, 1998, USAID Deputy Assistant Administrator for Human Resources, [name], informed [grievant] that the 1998 PSB had determined that his performance did not meet the standards of his class. The July 30, 1998 Selection Board Ranking Report stated:

The Program Direction and Development Board evaluated your relative performance in the lower 3% of your class. For this reason, your file was referred to the (PSB). The PSB reviewed your file and concluded you did not meet the standards of your class.

From its review of your file, the Board concludes that your performance for the rating periods 1997-1998 and 1996-1997 exhibits marginal productivity in reaching established work goals and offers little or no evidence that you have made significant progress in correcting deficiencies in the areas of time management and prioritization. Further, your work objectives for the above-cited rating periods appear to be limited in scope and complexity when compared with those of other officers in the 02 class. For example, although the rater's narrative statements attest that Agency core values were demonstrated in your accomplishment of your work objectives, there is a marked paucity of description that would indicate your mastery of key skill areas, such as leadership, management, staff development and work quality. Agency reengineering and downsizing have required foreign service officers to do more with less. Your evaluation file did not provide evidence of having consistently produced work that is substantive in terms of quality and quantity. For this reason, the PSB has determined that your performance is not competitive with that of your peers.

[Name]'s August 4 letter informed [grievant] that he would be mandatorily retired November 30, 1998, a date subsequently extended. [Name] cited Automated Directives System (ADS) Chapter E463.5.16, Decision Rule:

An employee shall not be designated for mandatory retirement, i.e., selection out, unless that employee has previously been placed in category C (less competitive as compared with his/her peers), or category D (least Competitive-referred to a PSB) within the 3 years prior to the current cycle, in addition to being recommended for selection out in the current cycle.

[Name] explained that [grievant] was ranked in category D in 1995 and 1996 in addition to 1998, and told him he would be mandatorily retired based on relative performance as required by Section 608(b) of the Foreign Service Act of 1980. [Name] explained,

Retirement under this authority is based on a relative rather than an absolute performance determination. To determine whether or not your performance met the standards of your class, the PSB reviewed your performance evaluation file against files of others in your class.¹ The Board's comments on your Report Card, explaining its decision, are enclosed for your review. Should you choose to do so, you may grieve this matter . . . or seek consideration by the Special Review Board in accordance with Handbook 30, Chapter 3, Supplement 3B.

[Grievant] elected to pursue grievance procedures and, at the agency level, contended the 1998 Boards misinterpreted his 1997 and 1998 AEFs. [Grievant] argued that he had no problems at all during that time period concerning time management and prioritization, and claimed his rater indicated he was successful in meeting all his objectives. He noted an adverse comment regarding work prioritization in a November 25, 1996 letter from [name] concerning [grievant]' 1996 D ranking where she referred to [grievant]' AEFs for 1995, 1994, 1993, 1992, and 1991. [Grievant] argued that an erroneous statement in his 1990 AEF might have been the source of the adverse 1996-prioritization comment. [Grievant] also suggested that a partly erroneous statement in his 1992 AEF may have led the 1995 and 1996 Selection Boards to question his managerial skills. Finally grievant argued that, beginning in 1988, he sought unsuccessfully to be assigned to positions with greater responsibility. He was denied training opportunities in 1991 and in 1993, 1994, and 1995, he had difficulties obtaining timely and accurate work objectives.

¹ A total off 116 FO/02 employees were evaluated.

In the agency decision, [name] pointed out that the Foreign Service Grievance Board (FSGB) had previously denied [grievant]' request for expungement of his 1995 D ranking on January 6, 1999 (FSGB Case No. 97-096²). [Name] also noted that, in stressing his productivity, [grievant] failed to address the underlying question of how productive he was compared to his peers. She disputed [grievant]'s contention that the 1998 AEF sentences were misleading because they referred to a stress-related health problem rather than to any problem with time management or prioritization. [Name] concluded that since the PSB had not misinterpreted the comment of [name], OSDBU Deputy Director, the only remaining issue was whether the PSB's comments justified [grievant]' selection out. In this regard, [name] observed, "It is well established in case law that the judgment of the PSB is not grievable."

In his appeal to the FSGB, [grievant] argued that the 1998 PSB erred by including the 1997 AEF in its comments because he was B-ranked in 1997. Addressing the PSB's observation on his "marginal productivity," [grievant] claimed he was consistently productive in meeting his work goals. He maintained that [name]'s comments were misleading because they referred to a stress-related health problem and were contradicted by the AEF's substance. Regarding the scope and complexity of his work objectives, [grievant] noted that his objectives were the same as those of the other four business specialists in OSDBU and that he met the full extent of his responsibilities. [Grievant] argued finally that his AEFs belied the PSB's comment about the "paucity of description that would indicate your mastery of key skill areas, such as leadership, management, staff development, and

² In FSGB Case No. 97-096, [grievant] challenged 1993 and 1995 low rankings and underlying AEFs.

work quality.” [Grievant] pointed out a number of examples in the AEFs that attested to his use of those skills.

In its acknowledgment letter, the Board granted [grievant] temporary interim relief from separation and queried the parties about continuation of interim relief. [Grievant] replied that, during discovery, he would be able to buttress his claims that his 1997 and 1998 AEFs were “inaccurate and misleading” and that “my position, as I encumbered it, does indeed make me competitive with my peers.” [Grievant] also claimed that he would demonstrate the agency failed to place him in career-enhancing positions despite his efforts to take on more responsibility. Without objection by the agency, the Board extended interim relief on April 17, 2000.

On April 24, 2000, the agency presented a Motion to Dismiss [grievant]’ grievance for lack of jurisdiction. It was denied on June 29, 2000.

On May 10, 2000, [grievant] filed a Motion to Compel Discovery. Whereas the agency initially denied all twelve of [grievant]’ requests, on July 10, 2000, the agency agreed to respond to [grievant]’ first six requests directed to [name] and OSDBU Director (and Appraisal Committee Representative) [name]. On July 13, 2000, the Board ruled that the agency was not compelled to obtain responses from co-workers who played no role in appraising [grievant]’ performance or from former employees since they were not subject to agency control. The Board affirmed that [grievant] could seek information directly from those persons, if he so wished.

On September 7, 2000, [grievant] presented a supplemental submission. He insisted the discovery responses by [name] and [name] supported his claim that he had completed all his tasks in a timely manner. [Grievant] also submitted a letter from co-worker [name], the

OSDBU/MRC's Senior Business Specialist who stated that [grievant] met all required deadlines.

Grievant also argued that [name] knew that when [grievant] spoke with her from time to time about stress, the stress was due to [grievant]'s depressions and not to problems with time management and setting priorities.

In concluding, [grievant] emphasized that his 1999-2000 AEF was highly favorable.

He added:

The record also indicates that I made the best of what I was given. For reasons I cannot fathom, the Agency has consistently refused to allow me to move into positions of more responsibility, commensurate with those of my peers. All of my AEFs in this office indicate that I have met all my objectives successfully and competently. Because the statement relied upon by the Board is false, there remains no foundation upon which to leave the Board's decision standing.

In its October 16, 2000 response to [grievant]' supplemental submission, the agency stated:

Although it is true that Ms. [name] has been very laudatory of Grievant's performance of late, this does not diminish her previous observation of Grievant's performance in 1997

The agency added:

It is worth noting that the SB/PSB commented at length on the limited scope and complexity of Grievant's work objectives in OSDBU ". . . when compared with those of other officers in the 02 class." . . . the complexity of Grievant's work objectives, or the lack thereof, is a legitimate subject for selection board review and can serve as the basis of low-ranking. As stated in FSGB Case No. 98-072, selection boards may focus on the employee's level of responsibility in determining relative performance in an "up or out" personnel system such as the Foreign Service. The FSGB noted in its decision that even ". . . employees whose overall performance is very strong can be found less competitive than their peers whose records reflect enhanced breadth of experience and responsibilities."

The agency continued to maintain that [grievant]'s grievance constituted mere disagreement with the judgment of the 1998 SB/PSB.

On November 6, 2000, [grievant] submitted a rebuttal to the agency's response. He argued that while [name]'s 1998 AEF comments implied that his work was untimely and that he had problems with prioritization and time management, the rater's response in discovery ("Mr. [grievant] completed all of his tasks in a timely manner") negated her AEF comments. [Grievant] explained in detail his efforts to be assigned to "higher and broader positions" in 1991, 1992 and 1993. He alluded to similar efforts since 1988, concluding "I am now on the verge of being selected out. If the Agency fails to exercise its assignment responsibilities, then the Agency should not be allowed to low rank me." [Grievant] then states "the PSB is effectively basing part of its decision to select me out on a false AEF and part on a fact that I cannot control—the Agency's failure to accommodate my repeated requests for challenging and competitive assignments." [Grievant] cites FSGB Case Nos. 92-078, 94-18, 95-18, and 96-007 in support of his claim that he should not be penalized on the basis of his assignments.

In his November 6 submission, [grievant] also referred to a 1992 report entitled "A Report on Achieving Workforce Diversity at A.I.D." The report states that former Promotion Board members have indicated that EER statements for minority and women officers tend to be lackluster. [Grievant] maintained, "My AEFs consistently show this lackluster approach to rating."

Finally, [grievant] contends that *Lindsay v. Kissinger*, 367 F. Supp. 949 (1973) and Sections 608(a) and 610(a) of the Foreign Service Act of 1980 (hereinafter Act) require that USAID grant him a full and fair hearing.

In its response of November 8, 2000, the agency commented that the 1992 diversity report was entitled to “no evidentiary weight since Grievant has failed to show how this report constitutes evidence of discrimination personal to him.” The agency also commented that [grievant]’ reference to Section 610(a) of the Act was inapposite because [grievant] was being separated for relative performance rather than for cause. The agency opposed [grievant]’ request for a hearing and asked that the Record of Proceedings (ROP) be closed.

On November 30, 2000, [grievant] responded to the agency’s November 8 “surrebuttal”, again claiming that Section 608(a) of the Act entitled him to a fair hearing. On December 18, 2000, the ROP was closed. After discussion with the Board, [grievant] re-affirmed his request for a hearing. On February 27, 2001, [grievant] informed the Board that he was unable to participate in a pre-hearing conference scheduled for either February 28 or March 1. On February 28, the Board asked the parties to confirm their attendance at a pre-hearing scheduled for March 22. On March 7, [grievant] requested extension of interim relief. On March 8, the agency opposed the extension. On March 9, the Board denied further interim relief and ruled that [grievant] had not shown that he had met the statutory requirements of Section 1106(8) of the Act.

On March 16, [grievant] notified the Board that the agency had extended his separation to March 24, 2001. For administrative and health reasons, [grievant] requested that the pre-hearing conference be postponed until after his separation from the agency.

Following further postponements, on July 16, 2001, the agency filed a Motion to Set a Date Certain. Ensuing discussions resulted in selecting November 28 for a hearing before the Board.

On October 15, the Board held a pre-hearing conference with both parties. At that conference, [grievant] raised the question of whether Section 608³ or Section 610⁴ of the Foreign Service Act of 1980 formed the basis for his separation and controlled the procedures to be followed at the hearing.

The agency responded on October 19, declaring that [grievant] was being mandatorily retired based on relative performance under Section 608(b) of the Foreign Service Act of 1980. [Grievant] responded on October 29, acknowledging:

I clearly understand from the Agency's Deputy Assistant Administrator for Human Resources letter dated August 4, 1998, that I am being mandatorily retired based on relative performance as required by Section 608(b) of the Foreign Service Act (FAA) of 1980.

Finding that no real disagreement existed, the panel affirmed to the parties on November 14, 2001: “. . . this case is not a separation for cause action under Section 610.”

The Board conducted a hearing on November 28, 2001. [Grievant] made the first presentation. He argued that testimony gathered in discovery from [name] and [name] negated the Selection Board's conclusion that there was a deficiency on [grievant]' part which created a basis for separation.

With regard to the PSB's conclusion that [grievant]' work objectives appeared to be limited in scope and complexity when compared with other officers in the O-2 class, [grievant] pointed out that the agency assigned him to OSDBU.

³ 608 (b) In any case where the administrative review conducted under subsection (a) substantiates that a career member of the Service has failed to meet the standards of performance for his or her class, the member shall be retired from the Service and receive benefits in accordance with section 609 [22 U.S.C. § 4009].

⁴ 610 (a) Authorization of Secretary; hearing prior to separation; waiver of hearing; suspension pending final resolution.

(1) The Secretary may separate any member from the Service for such cause as will promote the efficiency of the Service.

So basically I don't see how I can be held accountable for work objectives that are limited in scope and complexity when this is totally out of my control, and in fact, the record will show that I had chronicled from 1998 where I had been trying to get a position with more responsibility. TR Page 10.⁵

[Grievant] cited FSGB precedent holding that a Selection Board may not penalize an employee on the basis of his assignment and that employees must be given assignments that offer a reasonable possibility of establishing their potential. [Grievant] contended that it is unfair and unjust for the agency to have denied him the kind of assignments that he needed for career growth and advancement and then to further compound the error by selecting him out.

Finally, [grievant] contended, he should receive consideration under the Rehabilitation Act of 1973 since, during the period in question, he was being treated for depression which affected his performance.

After cross-examining [grievant], the agency presented two witnesses: [Name] and [name], a former USAID employee and a member of the Appraisal Committee that reviewed [grievant]' 1997 and 1998 AEFs. [Grievant] cross-examined both witnesses.

In closing, the agency argued that the issue to be decided by the Board was the accuracy or inaccuracy of the two evaluations in question. The agency contended that [grievant] acknowledged there was nothing inaccurate about the 1997 AEF and further acknowledged he was involved in the AEF process and never objected at the time. With respect to the 1998 AEF, the agency contended [grievant] negotiated the language, was comfortable with the AEF at the time, and has presented no evidence that there was anything improper or inaccurate in the

⁵ TR refers to the transcript of the hearing conducted.

1998 AEF's language. The agency pointed out that [grievant] sought the OSDBU assignment and was aware of the risks, given the fact that he had three D rankings. The agency concluded that, given the lack of evidence of improper language in the 1997 and 1998 AEF's, the Board should find for the agency and deny the grievance.

[Grievant] argued in closing that during discovery it was determined that the language in the 1998 AEF did not illustrate a problem with time management or prioritization. Even [name] agreed [grievant] completed all of his work in a timely fashion, and the claim he did not complete subcontracting plans timely was contradicted by answers to his discovery.

On December 20, 2001, [grievant] requested that the Board re-open the record to allow him to clarify two of his responses given during the hearing and to submit his self-assessments for 1996/97 and 1997/98. On December 21, the agency opposed re-opening the record but did not object to entering the self-assessments in the record.

The Board determined that the transcript of the hearing would speak for itself and denied the request to re-open, but agreed to include the self-assessments and close the record.

The ROP was closed on February 11, 2002.

III. POSITIONS OF THE PARTIES

The Grievant

[Grievant]' appeal to the Board centers on his 1997 and 1998 rating evaluations. He maintains that the two AEFs include inaccurate and false material as well as errors of omission as he emphasized he is not grieving the judgment of the 1998 PSB.

As part of the 1997 AEF process, [grievant] submitted an eight-page, single-spaced self-assessment to [name] on April 29, 1997. The self-assessment detailed [grievant]' work during the rating year and offered examples of his numerous accomplishments. [Grievant] notes that in addition to four standard OSDBU work objectives, he requested additional responsibility and was given a unique work objective to prepare an updated version of the "Guide to Doing Business" and to develop a customer service plan for OSDBU/MRC, both of which he achieved.

The rater made use of the material furnished by [grievant], but in highly abbreviated fashion since the 1997 AEF form provided limited space. For instance, [grievant] wrote three pages explaining how he had displayed his mastery of specific skill areas. Those three pages were condensed into five sentences that filled the space available in the form. [Grievant] himself used nearly all the space made available for a rated employee. He described his responsibilities and how they contributed to the achievement of his objectives. At the November 2001 hearing, [grievant] explained that while he did not find inaccuracies in his 1997 AEF, it failed to give a complete description of skill areas, "for example, under leadership there were at least four other areas or sub-areas such as direct vision, work principles, initiative and changed management that were not discussed in the evaluation." [Grievant] furnished comments on those four areas in his self-assessment. [Grievant] explained that what the AEF contained was not wrong but its incompleteness was harmful: "I don't believe it was what the Board was looking for, which is why they came up with the statement that they did with regard to the skill areas."

On April 13, 1998, [grievant] submitted a seven-page, single-spaced self-assessment to [name]. The AEF form was revised late in 1997 and [name] had use of a full page to describe [grievant]' role in the organization and assess his performance against work objectives and performance measures. [Name] had another full page to assess [grievant]' overall performance, skill areas, potential, and areas for improvement. Despite the additional space, there was again substantial condensation of the material supplied by [grievant]. [Grievant], in turn, used approximately half of the page allotted for the rated employee to expand on the narrative of his accomplishments. At the hearing, [grievant] explained that his 1998 AEF shared a fault with his 1997 AEF in that it did not contain an adequate level of detail in describing the skill areas.

There was another difference in the makeup of the 1998 AEF form. While the 1997 form contained boxes that could be checked to show need for improvement in skill areas, page 4 of the 1998 version lists "FS/SFS Area for Improvement" as an area for the rater to assess. [Grievant] maintains that the two sentences from his 1998 AEF that appear to comply with this tasking are inaccurate and misleading.

He is always cooperative and willing to assist the office staff in completing assignments which on occasion causes him to overextend himself. This is an area for improvement which I have discussed with Mr. [grievant], and he should not accept additional responsibility before he has discussed the implication of the added responsibility with me.

[Grievant] believes those sentences led the 1998 PSB to conclude incorrectly that he had not "made significant progress in correcting deficiencies in the areas of time management and prioritization."

In his September 7, 2000 supplemental submission, [grievant] noted the responses to his discovery request:

For [name]:

1. What are some examples of Mr. [grievant] taking on more tasks than he can complete? **Agency Response: Ms. [name] stated that Mr. [grievant] completed all of his tasks in a timely manner; however, he overextended himself with subcontracting plan reviews.**
2. What are some examples that indicate Mr. [grievant] still has room for improvement in the areas of prioritization and time management? **Agency Response: See response to No. 1, immediately above.**

For [name]:

3. Did Mr. [grievant]' performance for the rating periods 1997-1998 and 1996-1997 exhibit marginal productivity in reaching established work goals or did he exceed what was expected of him? **Agency Response: Mr. [name] stated that Mr. [grievant] reached the established work goals very successfully.**
4. Did Mr. [grievant] exhibit any deficiencies in the areas of time management and prioritization during the rating periods 1997-1998 or 1996-1997? **Agency response: Mr. [name] stated that he did not observe any deficiencies with respect to those areas.**
5. Did Mr. [grievant] exhibit any deficiencies in key skill areas such as leadership, management, staff development and work quality during the rating periods 1997-1998 or 1996-1997? **Agency Response: Mr. [name] stated he did not observe any deficiencies in any of the skill areas.**
6. Did Mr. [grievant] fully and effectively carry out the responsibilities of his position during the rating periods for 1997-1998 and 1996-1997? **Agency Response: Mr. [name] answered this question in the affirmative.**

In his September 7, 2000 supplemental, [grievant] also submitted a letter from co-worker [name], who stated:

In his review of proposed Subcontracting Plans, and in his review and analysis of potential procurement opportunities for U.S. small businesses in the procurements described in forms AID 1410, Mr. [grievant] met all required deadlines.

[Grievant] argued that the statements by [name] and [name] show [name]'s response--that he overextended himself with subcontracting plan reviews--to be "blatantly false and

inaccurate.” [Grievant] also describes as “false” [name]’s statement that when he spoke with her from time to time about stress, she felt the stress was attributable to a deficit in his skills at time management and setting priorities. Grievant claims:

When I discussed areas for improvement with Ms. [name], the conversation was about stress which aggravated my depression. . . With respect to my health, it is documented in my medical records that I have been suffering from depression since the mid-1980s due to the discriminatory practices of USAID. It has also been documented in my medical records since December 1993 that I have been suffering from depression . . My condition became worse due to having to work with two hostile supervisors from August 1994 until my transfer to OSDBU in 1996. Since my OSDBU arrival in mid-1996, I have spoken to everyone in the office on several occasions about my stress and depression, except for Ms. [name]

[Grievant] acknowledges that he spoke about stress to his supervisor. In fact, he says he spoke to nearly everyone in the office about his stress and depression. [Grievant] denies, however, that his stress resulted from problems with time management and prioritization. As evidence that he did not let his depression get in the way of achieving his work objectives, he refers to affirmation by [name], [name], and [name] that he completed his tasks in a timely manner, meeting deadlines.

[Grievant] attributes the stress he experienced to the fact that he was sick. In his September 7, 2000 supplemental submission to the Board, [grievant] stated,

With respect to my health, it is documented in my medical records that I have been suffering from depression since the mid-1980s due to the discriminatory practices of USAID. It has also been documented in my medical records since December 1993 that I have been suffering from depression brought on in large part for two reasons: 1) an unfair low ranking in 1993; and 2) having been transferred in 1993 to an office which not only was being abolished, but as stated in my original grievance, was never able to give me a work plan despite several requests for one

At the hearing, [grievant] repeated his assertion: “during the period in question, '96-'97 and '97-'98, I was being treated for depression, which affected my

performance, and as such, I think I should receive consideration under the Rehabilitation Act of 1973.” TR Page 13.

With regard to the PSB’s comments concerning his marginal productivity and the paucity of description in the rater’s narrative indicating mastery of skill areas, [grievant] furnishes examples (particularly in his October 22, 1999 supplemental to his agency-level grievance) of both his high productivity and his skill mastery. Many of the examples are drawn from [grievant]’ 1997 and 1998 AEFs, both of which are quite positive. Indeed, the 1997 AEF resulted in a “B” category rating for [grievant].

Concerning the PSB’s unfavorable comparison of his work objectives with those of others in the 02 class, [grievant] argues that the work objectives were beyond his control and that the agency did not assign him to the positions of higher responsibility he sought. He finds parallels in four FSGB cases that he says found employees should not be penalized when agencies fail to place them in appropriate assignments. In FSGB Case No. 92-078 (February 22, 1994), the Board determined that in certain circumstances an extended stay in unassigned over complement status combined with a below-grade regular assignment could produce harm. In FSGB Case No. 94-18 (July 19, 1994), the Board concluded that a selection board may not penalize an employee solely because of a nontraditional assignment. In FSGB Case No. 95-18 (April 26, 1996), the Board provided a remedy for an employee who was assigned on detail to another organization for a lengthy period. In FSGB Case No.96-007 (February 3, 1997), the Board provided a remedy for an employee who sought appropriate assignments but was placed by his agency in a position one grade below his personal rank. At the hearing, [grievant] argued:

. . . the agency's precepts for promotion from Handbook 25 state that "the Board will not disadvantage any employee due to lack of demonstrated

supervisory experience when his or her assignment does not provide for such," and I submit that that same principle can be applied to the other areas that were mentioned, such as leadership, management, staff development, and work quality.

And in sum, I think it is unfair and unjust for the agency to have denied me the kind of assignments that I needed for career growth and advancement and then to further compound the error by selecting me out. TR Page 12.

Finally, [grievant] claimed that his AEFs were lackluster, alluding to a 1992 report that indicated efficiency reports written on women and minorities tend to be lackluster and argued that the agency had failed to grant him a required hearing in connection with his separation.

The Agency

The agency emphasized that the determination of the PSB is not at issue in [grievant]' grievance. The issue is the accuracy or inaccuracy of the 1997 and 1998 evaluations. The agency argues that if [grievant] is raising charges of discrimination with his allusions to a 1992 Diversity report, he has not supported such claims.

With respect to the first evaluation, the agency contends [grievant] acknowledges that there was nothing inaccurate about it. When asked to identify inaccuracies in the 1997 AEF, [grievant] replied, "Now, I wouldn't say it was wrong, but I don't believe it was what the Board was looking for . . ." TR Page 19.

The agency argues that there is no evidence to support [grievant]' claims that the 1997 AEF should have provided more information pointing out that [grievant] was involved in the process of preparing the AEF and never objected at the time. At the hearing, the agency asked [name],

Q Was it reviewed by the appraisal committee?

A Yes, it was reviewed by the appraisal committee.

- Q Okay. Could you read it over and tell us if you believe it was accurate or if there were any errors, either of occlusion or omission in it?
(Witness examines the document.)
- A This is the document. No omissions.
- Q And did you follow appropriate precepts in determining how to draft it?
- A Yes, I did.
- Q Did Mr. [grievant] ever come to you or to your knowledge the members of the appraisal committee and indicate that something was left out or not correct in this evaluation?
- A No. TR Page 28-29.

With respect to the second evaluation, the agency argues that whether or not [grievant] negotiated the language, he was comfortable with the final AEF as written. [Name] testified that [grievant] was aware of the sentences in his 1998 AEF identifying a weakness and did not express a concern to her about the statement. [Name], a member of both appraisal committees that reviewed [grievant]' 1997 and 1998 AEFs, testified that employees had ten days in which to come to the committee and request changes to their AEFs. While several employees requested deletions, changes, or additions, [grievant] did not approach the committee to complain about inaccuracies or omissions in his evaluations. Thus, the agency submits that there is no evidence of anything improper or inaccurate in the language of the two AEFs.

Concerning [grievant]' argument that the contested sentences in the 1998 AEF referred to stress brought on by depression, the agency contradicts this by emphasizing that at the hearing, [name] testified that her remarks did not refer to [grievant]' medical condition:

- Q. Mr. [grievant] has stated in his pleadings some discussion of the third paragraph from the bottom on page 404 in this Exhibit B. Can you tell me if this was a comment on his performance or on his health?
- A What page?

Q I'm sorry. Third paragraph from the bottom starting, "He's always cooperative and willing to assist the office staffing, completing assignments -- "

A I would say it is a performance factor or comment, more or less. TR Page 30.

With respect to [grievant]' arguments that he was disadvantaged in terms of assignments, the agency maintains that [grievant] sought the OSDBU job despite receiving advice to the contrary. During the hearing, [name] spoke to this issue,

Q Did you have the occasion to meet with Mr. [grievant] before he began working in OSDBU?

A Yes.

Q And at that time, did you have concerns about him coming to work for OSDBU?

A Yes. I had concerns because I realized that [grievant] coming in as a foreign service officer, OSDBU perhaps would not offer the types of assignments that he would need to enhance his career and be promoted to a higher level.

Q And did you convey those concerns to Mr. [grievant]?

A Yes, I did.

Q What was his reaction?

A He was aware of it, and he still wanted to come to the office. TR Page 26-27.

The agency also noted that [grievant]' April 3, 2000 memorandum to the Board states:

Mr. [name] [[grievant]' CDO] and I discussed the possibility that the job in OSDBU may not enhance my competitive position. At one time, we both agreed that taking the position in OSDBU would allow me to better resolve my health problems, with the understanding that I would be given opportunities for more responsible positions.

Following up at the hearing, the agency questioned [grievant] about his decision to work in OSDBU:

Q Isn't it a fact that you chose this particular assignment knowing that it wouldn't enhance your competitive position because you were not feeling well?

A No. I chose the position because my major responsibilities in the [section] Bureau had been gutted.

- Q But you did discuss the possibility with your career development officer that the job in OSDBU may not enhance your competitive position, isn't that right?
- A Absolutely.
- Q So you were aware that the job in OSDBU would not help you in terms of your competitive status?
- A That was a possibility, yes.
- Q Now at the time that you were aware of that, were you aware that you had previously had a D ranking in 1993, 1994 and 1996?
- A Yes.
- Q Okay. And you were aware at the time that the board -- when they make a determination, they look not only at this past evaluation year but at years in the past, in fact that they are required to look at least five years in the past?
- A Yes.
- Q Okay. So, at a time when you knew that you already had three D rankings and the board is looking at your past rankings and evaluations, you nevertheless chose a position that you knew would not enhance your competitive status, isn't that right?
- A Well, I did that because I thought I was going to prevail on the earlier -- the '93 low ranking -- the earlier grievance. I thought I would prevail. TR Page 14-16.

On the subject of grievant's claim that he deserved consideration under the Rehabilitation Act of 1973, the agency contends that [grievant]' supervisors were unaware of a health problem affecting his work. The agency pointed out at the hearing that [grievant] himself never brought his alleged health problem to the attention of his supervisors by requesting an accommodation.

- Q Okay. Now, you claimed in your direct examination that you were treated for depression and you should receive consideration under the Rehabilitation Act of 1973. Did you ever request a reasonable accommodation based upon your physical condition?
- A Request from, whom?
- Q From you. Did you ever go to your supervisors as is required in the Rehabilitation Act of 1973 and request some accommodation be made because of your illness?
- A No. In fact, it stated in the statement that we were just discussing I often took on more than I was assigned. TR Page 22-23.

The agency earlier stated its belief in its April 24, 2000 Motion to Dismiss that the relevant Board precedent is FSGB Case No. 98-72. In that case, the Board denied a grievant's contention that his receipt of "exceptional" or "effective" ratings in all six core job skills in his AEF equated to a comparable performance to his peers. The Board found the grievant's assessment constituted a grievance involving the judgment of the selection board, a matter specifically excluded from the grievance process under Section 1101(b)(2) of the Foreign Service Act. At the hearing, the agency reiterated its position in questioning [grievant],

Q Are you familiar with the general nature of the Foreign Service Up or Out System?

A Yeah, the general nature, yes.

Q And in that system, isn't it correct that -- and I would cite FSGB Case Number 98-072 which says -- and I'll read you what the Board said in the decision and you tell me if you agree with this. "In an Up or Out Personnel System, such as the Foreign Service, the competition for promotion becomes competitive as one rises through the ranks. Individuals are rated both on their own individual performances and in comparison to their peers. At the higher level, selection boards find themselves reviewing the files of employees who almost always without exception display exceptional qualities. In such circumstances, employees whose overall performance is strong can be found less competitive than their peers, whose records reflect enhanced breadth of experience and responsibility." Therefore, do you understand that in an up or out system that you can be judged by a board based upon the experience and responsibilities you have vis-a-vis other folks even if you do a good job in those responsibilities?

A Based on the experience and what?

Q The breadth of the experience, the type of duties that you had, would that be something that the board would factor into in determining whether to rank you a certain way?

A They would have to. TR Page 16-17.

The agency also quoted the following from the same case:

In response to grievant's contention that a selection board cannot focus on an employee's level of responsibility, the Board finds his position to lack merit. Selection boards are charged with assessing an employee's performance and

determining his/her potential to function effectively at the next higher level. To insure that selection board members fully understand their responsibilities the agency provides guidance on this very issue in its precepts. The "Precepts for Employee Evaluation" dated January 18, 1996 states that:

" . . . in determining potential to perform at the next higher level, [Selection Boards] will be guided by their independent assessment of the relative degree of difficulty, complexity and challenge of the stated work objective." In doing so, the selection board is not assessing the appropriateness of the employee's work objectives. Rather, it is identifying those who have displayed the skills to perform at the next higher level.

The agency maintains that [grievant]' claims about his high productivity and his skill mastery basically challenges the determination of the PSB and reveals no error grievable.

IV. DISCUSSION AND FINDINGS

We begin with reference to 22 CFR 905.1(a) which prescribes that a grievant bears the burden of proof in support of his grievance. Also, 22 CFR 901.18(c)(2) provides that decisions of selection and performance standards boards are not grievable in the absence of a showing of a violation of law, the regulations governing them or of the precepts guiding them. In this grievance, [grievant] does not allege that the 1998 PSB violated either law, regulations, or precepts.

[Grievant] identifies his 1997 and 1998 AEFs as the subjects of his grievance in his appeal to the Board and in subsequent submissions. The burden, then, is on the grievant to establish by a preponderance of the evidence that there was harmful agency error in the preparation of his 1997 and 1998 AEFs. The performance evaluation standard applied by this Board is well stated in FSGB Case No. 93-15 (December 23, 1993):

As a general matter, EERs must meet reasonable standards; perfection is not required. The critical test is whether an EER fairly and

accurately describes and assesses performance and potential with adequate clarity and documentation to constitute a reasonably discernible, objective and balanced appraisal.

The Board's task is to determine whether that standard was met in the challenged AEFs.

[Grievant] does not allege that any procedural violation occurred in the writing of his 1997 and 1998 AEFs. At the hearing, [name] explained:

Initially, in completing an AEF, I would have employees do an annual evaluation of their accomplishments and what they thought they had achieved during the rating period. They would draft up an evaluation. I would review it. I would add my comments and I would give it back to the employee for review changes, and we would both work on this process together That is the process of this case. TR Page 32-33.

[Grievant] added:

Specifically, I've prepared the self-assessment which addressed all of the work objectives and all of the skilled areas, which was the initial document that I gave Ms. [name], and from that self-assessment, then the actual evaluation was drafted from that. TR Page 33.

This cooperative process leads us to find that [grievant] did not lack opportunity to shape his 1997 and 1998 AEFs. [Grievant] worked with [name] in preparing the AEFs and did not dispute the final language in either AEF with his rater or with the appraisal committee. [Name] drew heavily on grievant's self-assessments and if [grievant] wished other language, [name] would have worked together with him to arrive at mutually acceptable language. At no point does [grievant] claim that he tried and failed to convince his rater to make changes, deletions or additions.

Merely because [grievant] believes certain accomplishments and skills should have received greater emphasis does not establish that his AEFs are flawed. In FSGB Case No. 97-72, the Board held, “. . . there is no requirement that an EER provide an exhaustive

listing of achievements. The rated officer has the opportunity in his statement, which is not limited in length, to amplify on those listed and to recount others.” In FSGB Case No. 97-57, the Board found, “a rating officer is not obliged to refer specifically to all of the achievements that a rated officer might have. Space alone would not permit such an enumeration.”

There is a section in the AEFs for the employee’s own comments. Employee statements allow rated officers to address any problems with their AEF and to discuss any mitigating circumstances. [Grievant] did not raise, attempt to refute, or explain any problem areas in the 1998 area for improvement. His failure to do so leads the Board to the conclusion that he was not particularly concerned about his AEFs at the time. If, indeed, [grievant] did not fully take advantage of his chance, and this omission was detrimental to [grievant], it was his choice, and gives us no ground to remedy an alleged harm.

In any event, both AEFs are quite positive. In the 1997 AEF under “Summary Skill Areas,” [name] gave [grievant] the highest mark “exceptional” in the area of “professionalism” and the next to highest mark “effective” in the remaining five skill areas. The rater’s three other choices were: “needs improvement,” “unacceptable,” and “N/A.” Both the 1997 and 1998 AEFs depict [grievant] as an asset to OSDBU, bringing his experience in foreign operations to the office and performing, as [name] put it, “as well as I would expect an FS-2 Private Enterprise Officer/Business Specialist to perform . . .”

The 1997 AEF mentions [grievant]’ “quick ability to effectively manage . . . changes,” and contains the observation, “The Guide [to Doing Business with USAID] and the Customer Service Plan were completed within specified timeframes.” The 1998 AEF notes, “Mr. [grievant] is exceptionally punctual and comprehensive in his written products.” The same

evaluation points out that [grievant] averaged twice as many counseling sessions to individuals, businesses and organizations as did his colleagues. The agency does not dispute [grievant]' claims that he completed his work in a timely manner.

The positive nature of the AEFs is underscored by [grievant]' conclusion that the only sentences in either AEF that could conceivably be interpreted as raising time management and prioritization problems were the two sentences in the 1998 AEF:

He is always cooperative and willing to assist the office staff in completing assignments which on occasion causes him to overextend himself. This is an area for improvement which I have discussed with Mr. [grievant], and he should not accept additional responsibility before he has discussed the implication of the added responsibility with me.

In reviewing these in the 1998 AEF, the Board first notes that the 1998 PSB does not refer to them in its statement. The PSB says only, "your performance for the rating periods 1997-1998 and 1996-1997 exhibits . . . little or no evidence that you have made significant progress in correcting deficiencies in the areas of time management and prioritization." Whether or not the disputed sentences contributed to this conclusion or whether the Selection Board simply felt there were too few positive statements about [grievant]' time management and prioritization is open to surmise. Accepting *arguendo* that the sentences were a factor in the PSB's reasoning, the question remains whether the sentences were falsely prejudicial.

A plain reading of the sentences is that [grievant] is a person whose eagerness to help others occasionally led him to overextend himself. The sentences do not state that [grievant] failed to meet his objectives or missed deadlines. There is no evidence the PSB was misled by them. [Name]'s observation is, in its way, complimentary to [grievant] because it highlights an arguably laudable willingness to assist others.

On the other hand, the remarks do identify a flaw in [grievant]'s performance and suggest a means to overcome it. [Grievant] and [name] agree that [grievant] complained to her about stress from time to time. [Name] says [grievant]'s complaints to her about stress were a result of grievant overextending himself in an effort to help others. [Name] attributed the stress complaints to [grievant]'s perceived inability to say "no," an observation she was uniquely positioned to make as [grievant]'s supervisor. As a solution, [name] suggested [grievant] not take on additional responsibility before he discussed the implication of the added responsibility with her. There is no inherent contradiction, as [grievant] claims, between the positive and balanced AEF and the area for improvement. The sentences reasonably depict an employee who, while meeting objectives, sometimes takes on more than he can comfortably handle in an effort to help others and in subcontracting reviews is identified as the area in which [grievant] overextended himself. The fact that [grievant] met required deadlines in his review of proposed subcontracting plans does not negate [name]'s comments concerning overextension.

[Grievant] certainly concurred with [name]'s comments at the time of the 1998 AEF. In fact, he had taken evidently special pains with the sentences on the area for improvement. At the hearing, [grievant] stated,

A I'd like to say in closing, on my '98 evaluation, that what actually happened was [name] gave me a draft of the document and it had, as I mentioned earlier in my question to Ms. [name], specific language that I had a problem with time management prioritization. I refused to sign that and I told [name] that it was a setup, the language came from an evaluation from something like '94, and we sat down and came up with the language that is currently there.

Q So the language you objected to was taken out?

A Yeah, I ended up negotiating some language, the language that is in there. TR Page 40-41.

What [grievant] disputes is therefore not the language of the area for improvement but [name]'s explanation about what prompted the sentences. In a October 22, 1999 memorandum, [grievant] says,

These sentences are misleading because they do not clearly reflect what my supervisor had in mind. These sentences are references to a stress-related health problem that I have, and this fact can be discussed with my supervisor. The sentences are falsely prejudicial because their intent is not clear, and they are misleading to the reader.

[Grievant] asserts that the stress about which he complained to [name] was related to a longstanding medical condition—depression—not to problems with time management. In his September 7, 2000 Supplemental Submission, [grievant] says, “The explanation provided by Ms. [name] is false. When I discussed areas for improvement with Ms. [name], the conversation was about stress which aggravated my depression.” Also, [grievant] describes as “false” [name]'s statement that when he spoke with her from time to time about stress, she felt the stress was attributable to a deficit in [grievant]' skills at time management and setting priorities. The Board is thus presented with two opposing explanations for sentences that evidently were satisfactory to both [grievant] and [name] when they were written.

[Grievant] has presented no evidence to support his claim that his discussions with [name] were about health rather than work performance. Further, [grievant] admits he did not request accommodation for a health problem. The record contains neither medical records to back [grievant]' adverse health claim nor supporting testimony from witnesses. Although [grievant] says he spoke to nearly everyone in his office about his stress and depression, none of the testimony brought forward in discovery or at the hearing mentions his stress or depression. At the hearing, [name] repeated her explanation. [Grievant] did not

take advantage of the hearing to examine [name] about her allegedly “false” statements, and failed to make reference to either stress or depression when questioning her. Finally, [grievant] himself asserts that his health problems did not affect his work performance, stating in his September 7, 2000 memorandum, “Nevertheless, I never let my depression get in the way of achieving my work objectives in a timely fashion.”

Absent any contrary evidence, we find reasonable [name]’s claims that she was not aware of a medical condition requiring accommodation. Indeed, [grievant] seems to support [name] when he comments “I requested additional responsibility, and I was given it when opportunity arose . . . I did not hesitate to assist my colleagues when an opportunity presented itself.”⁶ Finally, [grievant] has offered no explanation of why he and his supervisor would have chosen a comment about [grievant]’ health as an “area for improvement” in a performance evaluation. We hold that [grievant] has not carried his burden of showing through a preponderance of the evidence that [name]’s comments, which [grievant] says he helped craft, are inaccurate, falsely prejudicial, or misleading. The Board finds this aspect of his claim to be without merit.

In determining that [grievant]’ performance was not competitive with that of his peers, the 1998 PSB remarked that his “performance for the rating periods 1997-1998 and 1996-1997 exhibits marginal productivity in reaching established work goals,” that “there is a marked paucity of description that would indicate your mastery of key skill areas,” and that [grievant]’ “evaluation file did not provide evidence of having consistently produced work that is substantive in terms of quality and quantity.” [Grievant] counters that he was productive; exhibited competence in the required skill areas; and that the overall quality of

⁶ [grievant]’ April 30, 1999 memorandum to [name].

his work had been at least excellent. This argument challenges the judgment of the Board rather than the material that forms the basis for that judgment and is not grievable. FSGB Case No. 98-072.

Selection Boards, as did the 1998 Selection Board, do not merely judge an employee's performance. They judge that performance relative to others in the same class. Thus, even employees who exhibit a very strong performance may still be found less competitive than their peers. [Grievant]' 1997 and 1998 AEFS do not show by themselves how his performance compared with others.

With respect to the PSB's comment that [grievant]' "work objectives for the [1997 and 1998] rating periods appear to be limited in scope and complexity when compared with those of other officers in the 02 class," [grievant] argued at the hearing:

Handbook 25 states "that all employees should be given career-enhancing assignments and training opportunities on an equitable basis So basically I don't see how I can be held accountable for work objectives that are limited in scope and complexity when this is totally out of my control, and in fact, the record will show that I had chronicled from 1998 where I had been trying to get a position with more responsibility.

In support of his contention that he should not be penalized because the agency failed to place him in appropriate assignments, [grievant] cites FSGB Case Nos. 92-078, 94-18, 95-18, and 96-007. After reviewing these cases, we found no parallel between the current case and the cited cases. In FSGB Case No. 92-078 the Board determined that in certain circumstances an extended stay in unassigned over complement status combined with a below-grade regular assignment could produce harm. In FSGB Case No. 94-18 the Board did not let stand the very low ranking of an SFS employee in an at-grade assignment in a nontraditional assignment as a diplomat-in-residence who had been penalized solely

because the assignment was nontraditional. In FSGB Case No. 95-18 the grievant had been assigned to positions below her personal grade for all but a short period after her last promotion. An important and relevant issue involved the grievant's lengthy periods on an essentially coerced out-of-agency detail support complement, not in a classified position at grade. In FSGB Case No. 96-007 the grievant actively sought appropriate senior assignments throughout his years as an FE-OC but was placed by the agency in an assignment one grade below his personal rank.

In contrast to employees who did not seek the assignments they received and who received assignments that were either below grade, over complement, or outside the agency, [grievant] does not refute the agency's claim that he sought the position in OSDBU even though [name] and [name] counseled him that the job would not enhance [grievant]' competitive position. Furthermore, the record does not show that [grievant] was placed unwillingly in his previous position in AFR/SA/PAD or that either that position or the OSDBU position was irregular or below grade. Thus, the Board finds no correspondence between [grievant]' situation and the cases he cites. The Board finds this aspect of [grievant]' claim to be without merit.

As noted above, [grievant] does not support his claim to possible consideration under the Rehabilitation Act of 1973 with any medical evidence, nor did he request accommodation. In fact, much of [grievant]' presentation has argued that he did not exhibit any performance deficiencies and, indeed, that he outperformed his colleagues in some important respects. Other than [grievant]' assertion, there are no grounds for the Board to conclude that [name] was aware of [grievant]' health condition or that she had his health condition in mind when she suggested an area for improvement.

The Board finds that grievant has not met the burden of establishing, by a preponderance of evidence, that the grievance is meritorious.

V. DECISION

The grievance appeal is denied.